

Appeal from a Decision of the Alaska State Office, Bureau of Land Management, denying reconstructed application for Native allotment F-13040, Parcel A.

Affirmed as modified.

1. Alaska: Native Allotments

Under section 905(c) of ANILCA, a Native allotment applicant may amend the land description contained in his application if the description designates land other than that which the applicant intended to claim and the new description describes the land originally intended to be claimed. However, amendment to permit the substitution of new or additional land which the applicant had not originally intended to claim is not authorized. A reconstructed application seeking more lands than originally applied for is properly rejected as to the additional lands if the record fails to indicate that the applicant had originally intended to claim the additional land.

2. Alaska: Native Allotments

A request for reinstatement of a Native allotment application, which was previously rejected as a matter of law because it indicated use and occupancy postdating a state selection, must be supported by evidence demonstrating an error in the original application. The request is properly denied if the parties seeking reinstatement have tendered only an allegation by a party other than the applicant that use and occupancy had commenced before the date stated on the original application.

3. Alaska: Native Allotments--Res Judicata--Rules of Practice: Appeals: Generally

The doctrine of administrative finality dictates that once a party has availed himself of the opportunity to

obtain administrative review within the Department, the party is precluded from relitigating the matter in subsequent proceedings except upon a showing of compelling legal or equitable reasons. Where BLM's rejection of a Native Allotment application was fully litigated within the Department; where there is no showing of compelling legal or equitable reasons to reopen the matter or manifest injustice; and where the applicant was afforded due process, administrative finality bars consideration of a restructured Native allotment application.

APPEARANCES: Andrew Harrington, Esq., William E. Caldwell, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for Appellant; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Roselyn Isaac has appealed from the July 20, 1994, Decision of the Alaska State Office, Bureau of Land Management (BLM), denying her reconstructed application for Native allotment F-13040, Parcel A.

On July 13, 1970, Appellant filed Native allotment application F-13040 with BLM pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970). 1/ This original application described 40 acres located on Lake Mansfield in sec. 30, T. 20 N., R. 11 E., Copper River Meridian, and stated that Appellant's use and occupancy began in November 1961.

On May 28, 1974, BLM informed Appellant that the land she had applied for was not available to her as a Native allotment because her use and occupancy commenced after the State of Alaska filed selection application F-027791 for the land on May 25, 1961. After Appellant failed to respond to several requests to submit additional evidence concerning her dates of use and occupancy, BLM rejected her application because her use and occupancy began after the State selection application was filed. She appealed.

In Roselyn Isaac, 23 IBLA 124, 126 (1975), the Board affirmed BLM's Decision, stating:

Neither the appellant nor her attorney, despite repeated opportunities, have made any factual allegation tending to establish occupancy prior to the time of the state selection. The

1/ The Alaska Native Allotment Act was repealed by the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1617 (1994), with a savings provision for applications pending on Dec. 18, 1971.

only statement advanced on behalf of the appellant apart from the application is the conclusory statement of the attorney in the statement of reasons that there is a "factual dispute." This conclusion of counsel is not justified by anything appearing in the record.

In Roselyn Isaac (On Reconsideration), 53 IBLA 306, 309 (1981), the Board sustained its earlier decision, noting that "[a]n application for a Native allotment application must be rejected if the alleged use and occupancy commenced after the time that a State's selection application was filed for the land." We noted in our decision on reconsideration that Isaac had "at no time * * * alleged use prior to November 1961" and that no dispute existed as to the date on which the alleged uses and occupancy began.

More than 9 years later, on December 20, 1990, Tanana Chiefs Conference, Inc. (TCC), filed a reconstructed application for Native allotment F-13040 on behalf of Appellant. In this application, two parcels were described: Parcel A, containing 80 acres on the shores of Lake Mansfield within secs. 19 and 30, T. 20 N., R. 11 E., Copper River Meridian, and Parcel B, containing 80 acres near the Tanacross Airfield in sec. 23, T. 18 N., R. 11 E., Copper River Meridian. This appeal concerns only Parcel A. ^{2/} The reconstructed application stated that Appellant had occupied the land from the "Late 50s" or "1956," beginning occupancy in May 1956.

^{2/} In an affidavit filed with the reconstructed application, Appellant conceded that BLM only had a record of her Jan. 22, 1970, 40-acre filing, but alleged that she filed for her allotment "in two places: 80 acres near Tanacross and 80 acres near Lake Mansfield." She lists a number of witnesses to these filings, most of whom are deceased. In another affidavit, Appellant states that "[f]or some reason unknown to me my application was lost and never made it to the Bureau of Land Management."

According to an Oct. 4, 1990, memorandum from TCC, Appellant filed for two parcels, but the description for only one parcel was written on her Jan. 22, 1970, application:

"[T]he second parcel was notated on an original BIA [Bureau of Indian Affairs] USGS [United States Geological Survey] quad map * * *, but an 'X' was crossed thru the allotment parcel. We have found this occurred on six allotment parcels in the same vicinity. We've determined that these parcels were crossed out by BIA on the premises that they would be rejected because of the State of Alaska patent. However, BIA did not have the authority to make this determination. The applicant intended to apply for these lands, but BIA did not write the legal description on the applicant's application."

In a Mar. 14, 1989, letter to the TCC, William H. Mattice, a former BIA realty officer, had responded to queries by TCC as to why the allotment parcels of certain individuals were "x'd out" on maps:

"I'm returning your maps that show Kenneth Thomas', Roy Denny's, and Julius Paul's Native allotments 'X'd' out.

"Those were done about 20 years ago, so it is really difficult if not impossible to remember what was done or why it was done. Your supposition

The lands in Parcel A were conveyed to Native corporations Tanacross Inc., and Doyon, Ltd., on July 24, 1991.

In the decision under appeal, BLM denied the reconstructed application for Parcel A, citing administrative finality and the lack of a showing of compelling legal or equitable reasons for either reinstating or accepting the application. BLM pointed out that Appellant had been afforded "numerous opportunities to correct the use and occupancy date," but had waited "approximately 15 years after she was first notified that her application did not predate the State selection application" to file her restructured application.

Appellant disputes BLM's use of administrative finality as a basis for denying her reconstructed allotment application and refers to Aguilar, *supra*, as the proper basis for adjudicating Parcel A. 3/ She argues that, under the circumstances here, it was BLM's responsibility "to solicit an

fn. 2 (continued)

that it was because the land was patented to the State is probably correct.

Back then, I am sure we believed that it would be fruitless to challenge the patents. Patented land was just not available, so there was no use completing an application for that land. There is no other reason that I can think of that would cause the three parcels to be 'X'd' out."

The record also includes a Nov. 22, 1993, Affidavit by Edward Isaac (apparently no relation to Roselyn Isaac). Isaac states therein that he worked with BIA from September through December 1970, traveling to villages and taking Native allotment applications from applicants. He states that he would fill out the applications, that the applicants would sign their own name, and that most of them selected 40-acre lots. He then took the applications back to the BIA office where he told the staff that the applications needed to be completed. One of the applications he took was Roselyn Isaac's.

Following receipt of these filings, BLM apparently became satisfied that Roselyn Isaac intended to apply for two parcels, as it accepted her amended application insofar as it concerns Parcel B. However, noting that the lands in Parcel B had been conveyed to the State of Alaska on Nov. 20, 1963, BLM ruled that the application for Parcel B would be adjudicated pursuant to the stipulations entered into in settlement of Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979). That action is not under review herein.

3/ Aguilar involved a class action suit brought by various Native allotment applicants in those situations in which the Department had already conveyed to the State title to the land sought for allotment. Rejecting the Department's position that it had no authority to investigate the circumstances surrounding patent issuance, the District Court held that it was the Department's responsibility to make an initial determination as to the validity of the allotment claim in order to determine whether or not the Government would bear the burden of going forward with a suit to annul the patent and have jurisdiction restored to the Department.

affidavit from the applicant" furnishing information as to use and occupancy predating the State selection. (Statement of Reasons (SOR) at 4-5.) Appellant also argues that she is entitled to a hearing as provided in Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976); that her application must be reinstated and adjudicated because it was pending on December 18, 1971; and that the State's 1961 selection was ineffective.

BLM responds that the affidavits submitted in support of the reconstructed application do not indicate that an error was made when the date for use and occupancy was entered on the original application. Hence, BLM concludes no compelling legal or equitable reasons (such as violations of basic rights or the need to prevent an injustice) have been shown for readjudicating the case. BLM contends that Appellant is not an Aguilar class member, since her application was not denied because the land described therein was conveyed to the State of Alaska prior to the adjudication of her application. Rather, the land described in Appellant's application remained under the jurisdiction of the Department and was ultimately conveyed to Native groups, not the State.

[1] We first consider whether Appellant may properly increase the size of Parcel A from 40 to 80 acres. It is now well established that, under section 905(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(c) (1994), a Native allotment applicant may amend the land description contained in the application if the description designates land other than that which the applicant intended to claim and the new description describes the land originally intended to be claimed.

Estate of Stan Paukan, 146 IBLA 204, 208 (1998). However, amendment to permit the substitution of new or additional land which the applicant had not originally intended to claim is not authorized. Estate of Paukan, *supra*; Heirs of Alice Byayuk, 136 IBLA 132, 137 (1996); Heirs of Edward Peter, 122 IBLA 109, 116-17 (1992); State of Alaska, 119 IBLA 260, 266-67 (1991); Mitchell Allen, 117 IBLA 330, 337 (1991).

fn. 3 (continued)

Appellant asserts that the issue in this case is whether her occupancy preceded the commencement of rights of the State. She cites paragraph 3 of the Aguilar procedures, which provides:

"Where the merits of the application turn on whether the applicant's use and occupancy predate the commencement of the rights of the State, the BLM will examine the file. * * * If the application and contents of the file indicate that the applicant's use and occupancy began after the rights of the State arose, the BLM will inform the applicant by letter of the date of commencement of the State's rights and that the application will be rejected unless the applicant files an affidavit within ninety days alleging, with particularity, specific use prior to the date on which the rights of the State arose."

Stipulated Procedures for Implementation of Order, filed Feb. 7, 1983, in Aguilar, *supra*.

A copy of the map describing the lands on Lake Mansfield selected by Appellant in 1970 is in the case record. This map clearly shows a parcel of approximately 40 acres, bounded on the north by the line between sections 19 and 30. The number "40" appears directly below Appellant's name on that map. That is significant because the number "80" appears near the lands that have been accepted as Parcel B, thus strongly suggesting that Appellant intended to select 40 acres near Lake Mansfield and 80 acres near the Tanacross Airfield. This is directly corroborated by a list of Native allotment applications that BIA employee Edward Isaac remembered taking, which shows that Roselyn Isaac applied for 40 acres at Lake Mansfield. (Edward Isaac Affidavit at 3.) Unlike for Parcel B (see note 2, *supra*), Appellant offers no explanation as to how her intent concerning Parcel A was not carried out when her application was filed in January 1970. Accordingly, BLM's Decision properly rejected Appellant's application as to any lands outside of section 19.

[2] Having determined that Appellant has applied for 40 acres in Parcel A, it remains to determine whether and how to adjudicate the merits of that application. While the Department cannot adjudicate interests in land to which it does not have title (*Bay View, Inc.*, 126 IBLA 281, 287 (1993)), the matter on appeal is not the adjudication of Appellant's right to the allotment, but of whether her closed Native allotment application could be reinstated. It is established that, where a Native allotment application has been terminated or rejected because averments on the face of the application were insufficient as a matter of law, reinstatement is not appropriate, absent clear evidence demonstrating a significant error in the application. *State of Alaska (Heirs of Takak)*, 135 IBLA 1, 4 (1996); *Lena Baker Maples*, 129 IBLA 167, 170-71 (1994); *Franklin Silas*, 117 IBLA 358, 364 (1991) (clarified on judicial remand, 129 IBLA 15 (1994); *aff'd sub nom. Silas v. Babbitt*, 96 F.3d 355 (9th Cir. 1996)). The burden of proof lies with the party seeking reinstatement, and that party must submit evidence that clearly demonstrates that the original application contained a significant error. *Lena Baker Maples*, 129 IBLA at 171; *Franklin Silas*, 117 IBLA at 364; *Donald Peter*, 107 IBLA 272 (1989); *William Carlo, Jr.*, 104 IBLA 277 (1988); *Andrew Petla*, 43 IBLA 186, 192 (1979).

In *Franklin Silas*, 117 IBLA at 364-65, we held that no hearing was required to determine whether to reinstate Silas' Native allotment application, and that reinstatement was not appropriate, since the initial BLM determination was based upon the applicant's declaration of material facts, which demonstrated conclusively that the application had to be rejected as a matter of law (in that the date indicated for initiation of use and occupancy postdated selection by the State), and since Silas failed to tender sufficient evidence of a significant error on the face of the original application. Those are also the facts presented by the instant appeal.

We note that Appellant's May 1989 affidavit, submitted in support of her reconstructed application, simply indicates that she started using the land "about 1956." No explanation is offered as to why the use and occupancy dates appearing on the original application are wrong. The fact that

the sole evidence submitted in support of a claim of error was the applicant's self-serving statements averring that occupancy had been commenced before the withdrawals; the lack of persuasive evidence supporting the existence of an error in the original application; and the long time that passed before the error was asserted all militate against any argument that an error existed on the original application. See Franklin Silas, 117 IBLA at 365.

In these circumstances, as in Silas, no hearing was required. Pence v. Kleppe does not mandate a hearing as a matter of right whenever a Native allotment application is rejected; no Pence v. Kleppe hearing is required if, when taking the factual averments of the application as true, the application is insufficient on its face, as a matter of law, and thus affords no relief under the Alaska Native Allotment Act. In 1974, when BLM issued its decision regarding Appellant's application, it did so on the assumption that each and every averment in her application was correct. Appellant now attempts to create a dispute by claiming that a statement in her application was untrue. No issue of fact existed until Appellant claimed error in her petition for reinstatement, filed some 8 years after BLM's rejection of the original application was affirmed by this Board.

[3] We noted in Heirs of George Brown, 143 IBLA 221 (1998), that the fact that a Native allotment application had been rejected without a hearing does not, ipso facto, establish that it was "erroneously rejected."

Noting that the Pence court recognized that, when rejection was premised on a matter of law, no hearing was required, the Brown decision found that what Pence required and what section 905(a) of ANILCA authorized was the Departmental reexamination of those past cases in which an allotment application had been rejected with finality in order to determine whether or not due process was afforded. Reinstatement of applications was required only when either the minimum requirements of due process were not met or a manifest injustice would occur if the application were not reinstated.

We would affirm BLM even if we were to find Silas inapplicable. In Heirs of Howard Isaac (On Reconsideration), supra, issued subsequent to both Pence and section 905(a) of ANILCA, we stated:

Counsel for appellant contends that a hearing is required even in the absence of an allegation of use and occupancy prior to the State selection. An Alaska Native's right of selection under the allotment Act is non-alienable and is not subject to inheritance.

However, where an allotment selection has been made and the applicant has fully complied with the law and the regulations and has accomplished all that is required to be done during his lifetime, the equitable right to an allotment becomes a property right which is inheritable. Thomas S. Thorson, Jr., 17 IBLA 326, 327 (1974). The application in this case, like that in Thorson, was incomplete and required amendment to make it allowable under the law. This Board held in Thomas S. Thorson, Jr., supra, that no rights inure to the estate of a

deceased Native allotment applicant where the application which he filed does not show prima facie entitlement and where a basic amendment of the application would be required to conform to the law and the regulations. * * * [N]o hearing will be ordered where there is no allegation of use and occupancy prior to the time the land was segregated. See Pence v. Andrus, supra at 743; John Moore, 40 IBLA 321, 86 I.D. 279 (1979).

Heirs of Howard Isaac (On Reconsideration), supra, at 345.

On an issue of law, an appeal to the Board of Land Appeals satisfies the due process requirement. Alfred G. Hoyl v. Babbitt, 129 F.3d 1377, 1386 (10th Cir. 1997); G. Donald Massey, 142 IBLA 243 (1998); Santa Fe Pacific Railroad Co., 90 IBLA 200, 220 (1986); Robert J. King, 72 IBLA 75, 78 (1983). Due process mandates the opportunity to be heard, and Appellant was given that opportunity when the Board examined her original application, found that it should be rejected as a matter of law, and that no hearing was required. Its decision became final for the Department, and no appeal was taken to the District Court.

The doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, generally precludes reconsideration of matters finally resolved for the Department in an earlier appeal. Jesse R. Collins, 146 IBLA 45 (1998); Richard W. Taylor, 139 IBLA 236, 241 (1997); Homestake Mining Co. of California, 136 IBLA 307, 317 (1996); Laguna Gatuna, Inc., 131 IBLA 169, 172 (1994). The doctrine of administrative finality dictates that once a party has availed himself of the opportunity to obtain administrative review within the Department, the party is precluded from relitigating the matter in subsequent proceedings except upon a showing of compelling legal or equitable reasons. Richard W. Taylor, supra; Gifford H. Allen, 131 IBLA 195, 202 (1994). Appellant now seeks review of the issues addressed in the earlier decision. As discussed above, there was no manifest injustice here, and Appellant was provided with due process. As BLM held, the doctrine of administrative finality is clearly applicable.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge